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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1137

FOTOMAT CORPORATION,

Petitioner,

vs.

PHOTOVEST CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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PHOTOVEST CORPORATION,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Fotomat Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A)[1] is reported at 606 F.2d 704 (7th Cir. 1979). The opinion of the District Court (App. B) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 24, 1979 (App. C). A timely petition

[1]Because of the length of the opinions of the Court of Appeals and the District Court, the appendix to this petition has been separately bound.

for rehearing with a suggestion for rehearing *en banc* was denied on October 25, 1979 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Rule Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Rule 5(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> **Service: When required.** . . . [E]very pleading subsequent to the original complaint . . . every paper relating to discovery required to be served upon a party . . ., every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

Question Presented

Whether, in a non-jury federal antitrust case, the trial court's acceptance and expressed reliance upon a secret trial brief in excess of two hundred pages, which was not served upon the opposing party until two months after the commencement of trial, was a violation of the opposing party's due process rights under the Fifth Amendment, contrary to Rule 5 of the Federal Rules of Civil Procedure, and presumptively prejudicial.

Statement

Fotomat sells film and film processing through company-owned and franchised "Fotomat kiosks." Photovest operated fifteen such franchised kiosks in Indianapolis, and this case arose out of disagreements ensuing from that relationship. Photovest charged Fotomat with violations of federal and Indiana antitrust law, breach of contract, fraud, "tortious breach of contract," and bad faith defense of the lawsuit.

Three days before trial commenced, Fotomat counsel learned that counsel for Photovest had already given the federal district court a secret 207 page trial brief which Photovest did not intend to serve upon Fotomat (App. A at 3a). This trial brief was intended "to serve as a roadmap . . . of how we are, where we are at each point in the trial . . ." (X Tr. 1690), and was considered by Photovest "important to an understanding of what this case is really all about" (Trial Brief, at i). The brief canvassed every one of Photovest's contentions, described at exhaustive length facts favorable to Photovest's case, and, in the last of three volumes, provided a detailed comment on the credibility of Photovest's and Fotomat's anticipated witnesses, sharply attacking the latter.

Photovest counsel considered the brief so "sensitive" that they "would not have submitted . . . [it] had we thought we were going to submit it to . . . [Fotomat]" (X Tr. 1690). Rather, they "would have written a different, a lesser brief" (XI Tr. 1701).

Fotomat immediately complained to the trial court, only to find that the court intended to "leave counsel where they find themselves" (App. A at 3a). Fotomat then filed a motion to reconsider which was heard

before trial began. Photovest counsel protested that its trial brief contained "sensitive" material (II Tr. 212); that "[w]e prepared the entire document in the expectation it would be for the Court's consumption . . . " (II Tr. 211); and that "[i]n its present form it is not designed for comsumption by the other side's witnesses in anticipation of their testimony" (II Tr. 212).

The trial court agreed that the brief was so sensitive that Photovest never would have submitted it "in the first place if it was an exchange brief" (II Tr. 214). The court further noted that the trial brief was intended to "kerwhoppy" Fotomat (II Tr. 214), but concluded that the court would accept the brief because "I am going to accept all the help I can get that helps me get ready for correct rulings" (II Tr. 215).

The brief had its anticipated effect. During Photovest's opening arguments, for example, the trial court demonstrated that it had accepted the help it expected of the brief by asking several specific questions which had been generated by the trial brief of "which the other side hasn't had the benefit yet . . ." (II Tr. 226; *see generally* II Tr. 226, lines 9-12; II Tr. 227, lines 17-19; II Tr. 228, lines 21-23).

The trial court refused to require service of the brief, but did require Photovest to turn over to Fotomat a shortened version. What was finally served upon Fotomat constituted a drastically abridged version "omitting," in the words of Photovest's counsel, "those parts which in effect indicate how we expected to prove what we expect to prove" (X Tr. 1685). This resulted in the extirpation of key factual citations, comment on credibility, and a host of key points sought to be established by plaintiffs; in addition, the third volume, consisting of Photovest's analysis of anticipated witnesses, was completely withheld.

The trial court ordered this censured version turned over in three days (II Tr. 217; XI Tr. 1719). Photovest failed to do so until ten days later, after half its case had already been completed (App. A at 3a-4a; X Tr. 1687-88). The trial was then recessed for some two months, for unrelated reasons.

When trial resumed, Fotomat again urged that the in camera filing had been improper and asked for a new trial and recusal of the trial judge. This motion was also rejected, although Photovest at this time finally turned over an unabridged copy of its trial brief, with only eight days of its case in chief remaining (XI Tr. 1726). What was discovered in the original version was not just a highly argumentative exposition of law but a virulent and personal attack upon Fotomat's witnesses as well as its trial counsel (*see* pp. 11-12, *infra*).

Subsequent to trial, the trial court sitting without a jury found for Photovest on virtually every one of its counts in an opinion which contained no citation to legal authority and which copied the bulk of Photovest's proposed findings (App. B).[2] Judgment was entered in the amount of $2,923,557.

On appeal, the Seventh Circuit reversed the trial court in five major substantive areas, but affirmed the bulk of the judgment below. It also held, pursuant

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[2]The Seventh Circuit noted that the trial court "did adopt with little change the bulk of Photovest's findings . . ." (App. A at 58a).

to its rule making powers, that in camera filings of trial briefs would be prospectively barred within district courts in the Seventh Circuit (App. A at 10a). However, it declined to apply this ruling to Fotomat, rejecting Fotomat's claim of due process violation and its interpretation of Federal Rule of Civil Procedure 5(a) (App. A at 3a-11a).

The Court of Appeals acknowledged that the failure to serve trial briefs creates "the increased potential for prejudice . . ." (App. A at 9a).

> The district court judge, particularly in the case of a long and complex trial, who has entertained incorrect concepts about some aspects of the case during the course of the trial because of an ex parte brief, is placed in the difficult position of returning to a status quo ante position prior to engaging in the decisional process (*id.*).

Notwithstanding these observations, the Court declined to order a new trial and concluded instead that the trial brief "had not been demonstrated to have prejudiced the defendant" (App. A at 10a).

REASONS FOR GRANTING THE WRIT

This case presents an important question pertinent to federal trials concerning the propriety and effect of ex parte communications between an interested party and the trier of fact. Courts for many decades have condemned ex parte communications with a judge as violations of fundamental due process. In addition, the broad sweep of Federal Rule of Civil Procedure 5(a) appears to embody that fundamental principle and mandates that papers filed with a court also be served upon opposing counsel. In keeping with due process guarantees, the rule could hardly permit less.[3]

Rule 5(a) provides that specifically enumerated types of filings and every "similar paper" shall be served upon opposing counsel. The Court of Appeals acknowledged that this wording "suggests an expansive application of the rule" (App. A at 6a).[4] It concluded, however, that the "glaring absence from the list" of trial briefs, which it called items of "prominence and significance," shows that the framers of the rule did not intend for them to be served (*Id.*). That conclusion is a non sequitur.

Trial briefs are indeed prominent and significant items. No document is more calculated to influence than a trial brief, especially where the trial judge is the sole fact finder. Trial briefs are crucial in provid-

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[3]Rule 5, however, has never been examined or interpreted by this Court. Even the Court of Appeals acknowledged that no cases have addressed the application of Rule 5 to trial briefs (App. A at 6a).

[4]"The words 'similar paper' evidence an attempt by the draftsmen to avoid a restrictive interpretation of the rule's specific list of papers, which is not intended to be exhaustive." 4 Wright & Miller, *Federal Practice and Procedure: Civil* § 1143 at 577 (1969).

ing an "opportunity to communicate and *persuade* in advance of trial. . . . Of course, the *adversary must be served.* . . ." (emphasis added). Marshall, *Persuading Judges in Bench Trials,* LITIGATION 11, 12 (Summer, 1977).

It is inconceivable that any advisory committee could intend that such paper be subject to secret in camera filings. Could post-trial briefs, which are also not specifically mentioned by Rule 5(a), be filed for the trial court's edification but not served on counsel?

The mandate of the due process clause, as well as its application through the dictate of Rule 5(a), seems clear. But despite such clarity, trial briefs have been inconsistently treated in the federal district courts. While the Seventh Circuit has now imposed its own rule prospectively to the same effect as Rule 5(a), and some district courts specifically require in their rules that trial briefs be exchanged,[5] a number of other courts in other circuits expressly have excepted such important filings from the service requirement.[6] Still other courts may also sanction this practice by custom—the trial court here specifically noted that its approval of in

[5]*See e.g.,* Rule 5(a) of the United States District Court for the District of Maine.

[6]*See e.g.,* Rule 20(c) of the United States District Court for the District of Kansas; Rules XV and XVI of the United States District Court for the Eastern District of Michigan; Rule 5 of the United States District Court for the Southern District of Mississippi; Rule 13 of the United States District Court for the Western District of Arkansas; and Order Re: Civil Cases Set For Trial In Special Or Regular Terms Of Court In The District of South Carolina (issued July 7, 1964).

Rule 83 of the Federal Rules of Civil Procedure, by contrast, admonishes that district courts may only promulgate local rules which are "not inconsistent" with the Federal Rules. And, of course, the Federal Rules cannot be inconsistent with the Constitution.

camera filings was based only on its own unwritten practice (X Tr. 1696).[7]

The instant case clearly reflects how ill-advised is the policy of permitting any in camera filings. Had due process guarantees and Rule 5(a) been followed, no potential for infected decision-making could have arisen.

A fair trial in a fair tribunal is a basic requirement of due process. It cannot be enjoyed in the absence of an effective opportunity to be heard. A fundamental minimum must be a litigant's right to know of and respond to an adversary's argument before the trier of fact has undertaken to study and rely upon the opponent's advocacy.[8] This Court has affirmed that no meaningful opportunity to be heard can exist when a fact finder is long exposed to unilateral advocacy. *Armstrong v. Manzo,* 380 U.S. 545, 550 (1965).[9]

[7]Response to informal inquiries recently sent to attorneys around the country reveals that in several other districts the ex parte filing of trial briefs, at least prior to the conclusion of trial, is countenanced.

[8]"[P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). *See also Armstrong v. Manzo,* 380 U.S. 545, 552 (1965); *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970); *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976).

[9]In *Armstrong,* the Court held that a failure to notify a litigant of the pendency of proceedings, after which an order was entered against him, was not cured by subsequently permitting the litigant to present evidence in support of his position.

Disapproval of ex parte dealings with the trier of fact has also been voiced in a variety of other contexts. *See United States v. United States Gypsum Co.,* 438 U.S. 422, 460-62 (1978) (ex parte communications by judge with a deliberating jury); *Camero v. United States,* 375 F.2d 777, 780-81 (Ct.Clms. 1967) (ex parte communication between agency attorney and military judge); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 56 (D.C. Cir. 1977) (ex parte communications in

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The decision of the Court of Appeals reflects a significant departure from these very fundamental and basic tenets. It was indisputable that the trial court had viewed Photovest's case through a one-sided "road-map" so adversarial in nature that it was not designed for the opponent's consumption, and would not have been filed had exchange been anticipated. It was also true that the trial court was able to dwell upon these ex parte and therefore unanswerable arguments for almost two months. Yet the Court of Appeals still declined to order a new trial because the trial brief "had not been demonstrated to have prejudiced defendant" (App. A at 10a).

Such a decision ignores the reality of the decision-making process. How could Fotomat "show" prejudice short of psychoanalyzing the trial judge? A fundamental right—that of an unbiased and fair tribunal—was in fact conditioned upon proof impossible to obtain. How do judges think, and how did this particular trial judge think? As this Court has said, "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." *Berger v. United States,* 255 U.S. 22, 36 (1921).

Certain acts should always be considered presumptively prejudicial, particularly when the challenged procedure is so fraught with danger. Indeed, this and other courts have repeatedly stressed not only the importance of fairness in federal trials, but also the necessity for the appearance of fairness.[10]

agency rule making proceedings between participants and agency commissioners); *Haller v. Robbins,* 409 F.2d 857, 859 (1st Cir. 1969) (ex parte communication between prosecutor and judge prior to sentencing); *United States v. Huff,* 512 F.2d 66, 71 (5th Cir. 1975) (ex parte communication between prosecutor and judge prior to sentencing); *Burton v. G.A.C. Finance Co.,* 525 F.2d 961, 963-64 (5th Cir. 1976) (lodging of evidence with court without serving copy on opposing counsel).

In cases like the instant one, client-litigants can hardly be expected to have appropriate confidence in a judicial system in which their opponents are permitted to deluge the triers of fact with secret arguments and biased characterizations of fact—in effect to be granted a special audience with the triers of fact. It is just such submissions that cause the skepticism and disgruntlement that so many judges and lawyers have attempted to erradicate by preaching, and observing, the necessity of even the appearance of fairness.

Impartiality is obviously crucial to the decision-making process. Yet here the personal process of subjectively selecting among conflicting inferences and competing claims to credibility was endangered by the trial court's two month exposure to the Photovest trial brief. Just how does a litigant later undo the embedding in the fact finder's mind of such assertions as the one that "[Photovest's president] and the others were understandably under stress during 1970 as they struggled to patch together a sinking business" (Trial Brief,

[10] *E.g., Communist Party v. Subversive Activities Control Bd.,* 351 U.S. 115, 124 (1956); *Offutt v. United States,* 348 U.S. 11, 14 (1954); *In re Murchison,* 349 U.S. 133, 136 (1955); *Public Utilities Comm'n v. Pollak,* 343 U.S. 451, 466-67 (1952) (statement of Frankfurter, J.); *Regents of University of California v. Bakke,* 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.); *Proctor v. Warden, Maryland Penitentiary,* 435 U.S. 559, 560 (1978).

Even in an administrative proceeding, a case has been reversed where there has been an improper intrusion into the mental processes of the fact finder, the court stressing the appearance as well as the fact of a lack of impartiality. *The Pillsbury Co. v. FTC,* 354 F.2d 952, 963-64 (5th Cir. 1966). *See also Koniag, Inc. v. Andrus,* 580 F.2d 601, 610-11 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1052 (1979).

at 171-72), or to unring a bell which pealed that "the point of all this is that Fotomat has shown a willingness to adopt any position it thinks will intimidate, dupe, weaken or cajole the other side, quite without regard to what its admitted legal or moral obligations are" (Trial Brief, at 176).[11]

The Court of Appeals' conclusion that there was evidence to support those portions of the trial court's findings that were affirmed misses the point.[12] There was also evidence supporting Fotomat's view, but this conflicting evidence was examined by a trier of fact who candidly admitted that he intended to obtain all

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[11]That Fotomat was eventually given a belated view of Photovest's secret urgings can hardly be said to have removed the taint from the trial proceedings. The trier of fact had dwelled on Photovest's advocacy for too long to assure that its influence could be effectively counterbalanced. How can one say that there was no prejudice in view of the trial court's subsequent embracing of a "malicious defense" concept which the appellate court found to be completely specious (App. A at 52a-53a)?

For that matter, how does the lawyer for a litigant successfully dispel the effects of this secret invective when, for two months, the trier of fact has been mulling over secret charges that the opposing lawyer's behavior is "indefensible" (Trial Brief, at 98), that Fotomat's counsel is guilty of fabrications and inventions (*id.*), and that his law firm has been guilty of threatening abuse of other litigants and has "dreamed up" disingenuous "justification" for his client's activities (Trial Brief, at 99). Is it really so easy to dispel, retroactively, excoriations of "Fotomat's attitude toward litigation" as an illicit tool of competition (Trial Brief, at 74-75)?

[12]The Court of Appeals' holding that the trial brief did not influence and could not have prejudiced Fotomat is also inconsistent with its determination that at least five of the legal conclusions made by the district court were plainly incorrect and unsupported (App. A at 37a, 38a-42a, 48a-49a, 52a-53a, 55a).

the help he could from the ex parte submission (II Tr. 214).[13]

Moreover, the subjective aspects of the trial court's decision-making were effectively shielded from appellate review. Such review "is circumscribed by the deference . . . [the appellate court] must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).[14]

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[13]For instance, the district court concluded (and the Court of Appeals agreed that there was evidence to support the finding) that drive-thru film development stores do not compete with other retailers of film development such as drug stores, even though the product sold was identical (App. A at 17a). This finding was essential to Photovest's attempted monopolization claim which by itself constituted $2.8 million of the award. Viewed without all the trappings, isn't a film store a film store, whether you drive through or walk? Even Photovest's own president agreed (DX 4200 at 427-28).

[14]This strict view has been consistently applied by this Court and the various Circuits. It has been affirmed that "a choice between two permissible views of the weight of evidence is not 'clearly erroneous,'" *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); that "[c]hoices of credibility are within the discretion and prerogative of the trial court . . .," *Blunt v. Marion County School Board*, 515 F.2d 951, 958 (5th Cir. 1975); that the trier of fact "has the *exclusive* function of . . . drawing inferences from facts established, [and] resolving conflicts in the evidence, . . ." *Rasmussen Drilling v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978) (emphasis added); that the Courts of Appeals are not empowered to weigh the evidence, *Bellevue Gardens, Inc. v. Hill*, 297 F.2d 185, 186 (D.C. Cir. 1961); that a reviewing court's role is limited even with respect to inferences drawn from undisputed evidence, *Valley Cement Industries, Inc. v. Midco Equipment Co.*, 570 F.2d 1241, 1243 (5th Cir. 1978); and that reversal is not in order even if the Court of Appeals would have

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The conclusion is clear: a party confronted with an ex parte submission to the fact finder in a federal court should not have to search either the submission or the fact finder's conclusions for some sign of influence or prejudice. Some acts speak for themselves. Thus, it is clear beyond doubt that if what Photovest wrote to, and was read by, the trial judge had in fact been spoken to him, this case would have been reversed outright.[15] Why is the result different because the words were written? One could argue, in fact, that words in cold print carry a dignity, authority, and persuasiveness that far outweigh the same words spoken in the informal, often bantering, exchange that sometimes occurs between counsel and judge. Yet even such verbal exchanges are disallowed.[16]

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viewed the facts differently, *United Barge Co. v. Notre Dame Fleeting & Towing Service, Inc.*, 568 F.2d 599, 604 (8th Cir. 1978).

The Seventh Circuit has also heeded this rule. *See Pollice v. Hartford Fire Ins. Co.*, 355 F.2d 524, 525-26 (7th Cir. 1965). Indeed, that court views its duty as being only "to determine whether the evidence most favorable to the appellee will sustain a jury verdict." *Mann v. Anderson*, 447 F.2d 533, 536 (7th Cir. 1971).

[15]*E.g., Morgan v. United States*, 304 U.S. 1, 19-21 (1938); *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 51-59; *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 540-41 (3d Cir. 1948); *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 65-67 (D.C. Cir. 1958); *Haller v. Robbins, supra*, 409 F.2d at 859.

[16]In *United States v. Quattrone*, 149 F.Supp. 240 (D.D.C. 1957), Judge Youngdahl, while having a motion under advisement, was visited in his chambers by counsel not of record and asked about the expected date of the judge's ruling and of the trial. Although the attorney stated emphatically that he had neither the intention nor the desire to attempt to influence the court, Judge Youngdahl disqualified himself. "In making this decision," he said, "the Court believes that it should consider not only whether what has happened would actually influence the Court, but whether it might give the appearance of so doing." *Id.* at 241.

Triers of fact, as well as litigants, are entitled to an authoritative ruling from this Court in regard to this extraordinarily important and common practice of submitting trial briefs and on the issue of whether such briefs may continue in many courts to be filed in secret or whether all parties are required by Rule 5(a) and by the fact as well as the appearance of fairness to serve such briefs simultaneously upon all opposing parties.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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